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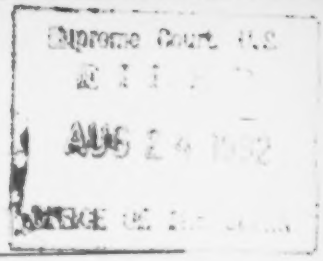

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

TAMMY PENTER, PETITIONER

V.

BALDWIN PIANO AND ORGAN COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTION PRESENTED

The question presented in this case is whether petitioner's right to due process of law was violated in a workers' compensation case, when the Full Commission, upon review of a cold record, reversed the decision of the Administrative Law Judge, which necessarily contained credibility findings.

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Tammy Penter petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arkansas is unreported, but is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas (App. A) was entered on May 26, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant provisions of Ark. Code Ann. § 11-9-711 (b) (4) provide that "[t]he court shall review only questions of law and may . . . reverse. . . upon any of the following grounds and no other: . . . (D) That the order or award was not supported by substantial evidence of record."

STATEMENT

This case involves a claim for workers' compensation benefits. After a hearing before an Administrative Law Judge (hereinafter ALJ), Tammy Penter was awarded a period of temporary total disability benefits. Upon a review of the cold record, the Full Commission reversed the ALJ's decision, finding that claimant was not entitled to any further temporary total disability benefits.

The claimant appealed the Full Commission's decision to the Supreme Court of Arkansas. In her appeal, she

maintained that her right to due process of law had been violated because the Commission reversed the ALJ's decision, including credibility findings, based only upon a review of the cold record. The Supreme Court of Arkansas affirmed the decision of the Full Commission, stating that the issue in the case did not turn on the credibility of a witness or witnesses, but upon the weighing of medical opinion testimony.

REASONS FOR GRANTING THE PETITION

The basis of this Petition is to direct the Court's attention to the unfair standard of review now presently adhered to by the Arkansas Appellate Courts relating to workers' compensation claims.

Presently, the decisions rendered by the Workers' Compensation Commission are not disturbed by an Appellate Court, even though the Appellate Court would review the evidence in a different light, if the

findings of the Commission are supported by substantial evidence. See, Alcoa v. Vann, 14 Ark. App. 223, 686 S.W. 2d 812 (1985); and Clark v. Peabody Testing Service, 265 Ark. 489, 579 S.W. 2d 360 (1979).

Yet the Workers' Compensation Commission reviews the decisions of ALJs de novo. Warwick Electronics, Inc. v. Devazier, 253 Ark. 1100, 490 S.W. 2d 792 (1973). The duty of the Workers' Compensation Commission is to make a finding in accordance with a preponderance of the evidence, and not on whether there is any substantial evidence to support the findings of the ALJ. Jones v. Scheduled Skyways, Inc., 1 Ark. App. 44, 612 S.W. 2d 333 (1981). Thus, even though the ALJ has the advantage of meeting the claimant face to face and personally hearing the testimony, the ALJ's credibility findings are of no affect. Instead the Commission is free to substitute its own findings

regarding credibility of witnesses. This renders the findings of the ALJ, the only fact finder who hears and sees the witnesses, insignificant.

When a decision of the Workers' Compensation Commission is appealed to the Arkansas Court of Appeals, no weight at all is given to the findings and conclusions of the ALJ, before whom the claimant's appeared. Tyson Foods Inc. v. Disheroon, 761 S. W. 2d 617, 618 (Ark. App. 1988). And, if there is any substantial evidence to support the Commission's findings, they will be affirmed. Arkansas Power & Light Co. v. Hooks, 295 Ark. 296, 749 S.W. 2d 291 (1988).

In the present case, Tammy Penter urged the Supreme Court of Arkansas to change the "substantial evidence" standard of review and adopt the "substantial evidence on the record as a whole" approach employed by the Eighth Circuit

Court of Appeals in Gavin v. Heckler, 811 F. 2d 1195 (8th Cir. 1987). A claimant's testimony and an ALJ's credibility findings would be included as part of the "evidence on the record as a whole." The Court declined, noting that they had recently considered this precise issue in Scarbrough v. Cherokee Enterprises, 33 Ark. App. 139, 803 S.W. 2d 561 (1991), aff'd, 306 Ark. 641, 816 S.W. 2d 876 (1991).

In the Scarbrough case, the Supreme Court of Arkansas declined to change the standard of review, primarily due to the constraints of stare decisis. The Court did note, however, that in certain circumstances where credibility is at issue, a party would be deprived of due process of law by the present standard. Specifically, the Court stated:

> "A reason which might indeed be compelling for holding that the initial fact finder's determinations of facts where credibility is at issue cannot be ignored would be that it deprives

> a party of due process of law. One of the **amicus curiae** has suggested that issue and has contended it is exacerbated by the partisan nature of the selection process for the members of the Commission. One member of the Commission represents employees, another represents employers, and the third is an attorney with no specified further affiliation. Ark. Code Ann. § 11-9-201 (A) (1987). Our **amicus** cites statistics which, it contends, show how the system of partisan commissioners skews the decision making process, making it something other than an impartial determination of workers' compensation claims. The due process question as it relates to credibility issues is, however, not one we can decide in this case. There is no disagreement among the ALJ, the Commission, and the Court of Appeals with respect to the factor in this case."

In her petition to the Supreme Court of Arkansas for review of the decision of the Arkansas Court of Appeals, Ms. Penter urged the Court to decide the due process question in her case, because her case was different than the Scarbrough case. In Ms. Penter's case, even though the overwhelming weight of evidence on the record as a whole supported the ALJ's

conclusion, the Commission reversed. Ms. Penter urged the Supreme Court of Arkansas to find that the Commission arbitrarily substituted its own judgment regarding the credibility of a witness as well as the finding of fact.

In its decision, the Supreme Court of Arkansas declined, stating that:

> "We find no dispute between the Administrative Law Judge and the Commission as to any fact. Ms. Penter's claim of disability is the ultimate issue in the case, and there is evidence in the record to support, and evidence to dispute, her claim. The decision of the Commission did not turn on the credibility of a witness or witnesses but upon the weighing of medical opinion testimony."

A decision as to whether Ms. Penter continued to be totally unable to work could not be made based on medical opinion alone. For, although the medical evidence could be relied upon to establish the nature of Ms. Penter's impairment, it cannot measure pain with mathematical precision. The claimant is the only

person who knows the precise effect such impairment has on her ability to work, and the ALJ was the only factfinder to directly observe the demeanor of the claimant. Because the ALJ was the only factfinder to actually see the claimant in person, his findings as to the affect of claimant's pain on her ability to work are entitled to more weight than the findings of a Commission who never actually sees the claimant.

Tammy Penter believes that her right to due process of law has been violated. Since the credibility of her testimony was an integral part of the ALJ's decision to award additional temporary total disability benefits, the Commission should not have been allowed to overrule the ALJ's findings based only upon its cold review of the record.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

ORIGINAL SIGNED BY

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August 24, 1992.

APPENDIX A

SUPREME COURT OF ARKANSAS

TAMMY PENTER Petitioner V. BALDWIN PIANO AND ORGAN COMPANY Respondent	)	No. 92-385 Opinion Delivered May 26, 1992 Petition for Review Denied

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PER CURIAM

The petitioner, Tammy Penter, asks that we review the decision of the Arkansas Court of Appeals affirming a decision of the Workers' Compensation Commission. The Commission found the evidence did not support Ms. Penter's claim for temporary total disability which had been allowed by the Administrative Law Judge.

Ms. Penter argued to the Court of Appeals that it should change its standard of review from that of whether there is "substantial evidence on the record as a

whole," a standard applied in Gavin v. Heckler, 811 F. 2d 1195 (8th Cir. 1987).

The same issue was raised in Scarbrough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W. 2d 876 (1991). We affirmed the Court of Appeals decision in that case but pointed out that there was no due process issue with respect to the manner in which facts were ascertained because there was no disagreement between the Administrative Law Judge who heard the evidence and the commission. We noted that if there had been a disagreement, and the question turned on credibility of witnesses seen and heard only by the Administrative Law Judge, a due process of law issue might have been presented.

Ms. Penter's petition for review in this case suggests there must have been a disagreement over credibility because the Administrative Law Judge believed her claim that she was unable to work during a

certain time but the Commission obviously did not.

We find no dispute between the Administrative Law Judge and the Commission as to any fact. Ms. Penter's claim of disability is the ultimate issue in this case, and there is evidence in the record to support,and evidence to dispute, her claim. The decision of the Commission did not turn on the credibility of a witness or witnesses but upon the weighing of medical opinion testimony.

Review denied.